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No. 87-436

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VINCENT C. LOMBARDI, et al.,

Petitioners,

vs.

DOW CHEMICAL CO., et al.,

Respondents.

In re "Agent Orange" Product Liability Litigation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted where the decisions of the courts below granting summary judgment against petitioners on the ground of the military contractor defense do not turn on any particular formulation of that defense but, instead, are based on the factual finding that "the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam," and thus "there never was any information of material hazards that should have been imparted by the chemical companies to the government"?

PARTIES BELOW

The parties to the proceeding below are petitioners, 292 plaintiffs who opted out of the Agent Orange class action suit who are listed in Petitioners' Appendix at 786a and the respondents, The Dow Chemical Company, Diamond Shamrock Chemicals Company, Hercules Incorporated, Monsanto Company, T H Agriculture & Nutrition Company, Inc., Thompson Chemicals Corporation and Uniroyal, Inc.*

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* The parent companies, subsidiaries and affiliates of the corporate parties, as required by Supreme Court Rule 28.1, are:

The Dow Chemical Company, Respondent.

Alamo Land Company, Inc., Compagnie des Services, Dowell Schlumberger, Cordis Dow Corporation, Dow Banking Corporation, Dow Scandia Banking Corporation, Ltd., Dow Chemical Iberica S.A., Dow Corning Corporation, Dowell Schlumberger Corporation, El Dorado Terminals Company, Gruppo Lepetit S.p.A., Ivon Watkins-Dow Limited, Joliet Marine Terminal, Ecuatorianos LIFE, Long Beach Marine Terminal, Oronzio de Nora Impianti Elettrochimici, S.A., Pacific Chemicals Berhad, Sinor Corradini Navarra S.A., Societe Industrielle de Plastic et de L'acier S.A., Technovast, The Cynara Company, The Kartridg Pak Co.

Diamond Shamrock Chemicals Company, Respondent.

Occidental Petroleum Corporation, Occidental Petroleum Investment Co., Occidental Chemical Holding Corporation, Oxy-Diamond Alkali Corporation, Canadian Occidental Petroleum Ltd., Occidental Chemical Corporation, Carboclora S.A. Industries Quimicas, Korea Pottasium Chemical Co., Ltd., Thai Diamond SHamrock Chrome Limited, Thai Diamond Shamrock Limited, Sanital Comercio e Empreendimentos, Petway Products Distributors, Inc., International Ore & Fertilizer Belgium SA, Oxy Metal Industries (France) SA, OxyTech Systems, Inc., Plasticos y Derivados Compania Anonima, Plastiflex, C.A., Malharia Industrial do Nordeste SA, Industries Oxy S.A., Sumitomo Durez Co. Ltd., Industries Quimica de Portuguesa SA, Mississippi Chemical Corporation, Occidental Minerals (Philippines) Inc., Tororo Industrial Chemicals & Fertilizers Limited, Trans-Jeff Chemical Corporation, Distribuidora y Exportadora Udylite, S.A.

(footnote continued)

Monsanto Company, Respondent.

ACM Sevices, Inc., Advent Eurofund Limited, Advent-Techno Venture Investment Corp. N.V., Australian Fluorine Chemicals Pty. Limited, Companhia Duasiliera de Dsuirena, Fosbrasil S.A., Hydrocarbon Products Pty. Ltd., K.K. Astro, Invitron Corporation, Korag Company Limited, Kinetek Systems Incorporated, Korsil Company Limited, Limewood Run-Off Limited, Mitsubishi Monsanto Chemical Company, Monsanto Chemicals of India Limited, Monsanto Chemicals (Thailand) Limited, Monsanto (Malaysia) Sendirian Berhad, Nippon Cooper Kabushiki Kaisha, Nippon Fisher Company, Ltd., Nomix Manufacturing Company Limited, NutraSweet AG, Quimica do Triangulo Ltda., Revertex Industries (Aust.) Pty. Limited, Revertex Industries (N.Z.) Ltd., Revinex Australia Limited, Ryowa, K.K., Titan Chemicals Limited, Tsukuba Service Company, Ltd.

Hercules Incorporated, Respondent.

A.C. Hatrick Chemicals Pty. Ltd., A.C. Hatrick, (N.Z.) Ltd., A/S Kobenhavens Pektinfabrik (CPF), A/S Kobenhavens Pektin Fabrik, Abieta Chemie GmbH, AEONIC Systems, Inc., Algas Marinas S.A., Alkyls do Brasil Ltds., Aqualon Company, Austchem Nominees Pty. Ltd., Australian Chemical Holdings Ltd., BHC Laboratories Inc., Caribbean Lumber Co., Centennial Lumber Company, Ceratonia, S.A., Cesalpinia, S.p.A., Champlain Cable Corporation, Compania Brasil Eira De Productos, Curtis Bay Insurance Co. Ltd., Dawood Hercules Chemical Ltd., Devron Hercules Inc., DIC-Hercules Chemicals Inc., EKC Technology, Inc., Electronic Display Systems, Inc., EPICOR Laboratories, Inc., Genu Products Canada Limited, Genu Products Philippines Inc., Hafimij B.V., Hercochem (H.K.) Ltd., Hercofina Europe V.O.F., Hercofina Joint Venture, Hercoform Incorporated, Hercoform Marketing Inc., Hercules Aerospace Espana, S.A., Hercules Andino S.A., Hercules Canada, Inc., Hercules Chemical Corporation, Hercules Chemicals Investments Pty. Ltd., Hercules Chemicals B.V., Hercules Credit Inc., Hercules de Centro America S.A., Hercules Defense Electronic Systems, Inc., Hercules Do Brasil Products Quimicos Ltd., Hercules Far East Ltd., Hercules Finance Co. Ltd., Hercules France S.A., Hercules GmbH, Hercules (Holdings) Ltd., Hercules Islands Corporation, Hercules Kemiska Aktiebolag, Hercules Ltd., Hercules Overseas Corporation, Hercules Taiwan Co. Ltd., Hercules Trading Corporation, Herdillia Chemicals Ltd., Hersean PTE Ltd., Himont Incorporated, Himont U.S.A., Inc., Himont Italia, Himont Belgium, Himont

(footnote continued)

Canada, Holden Vale Mfg. Co. Ltd., Infinetics, Inc., Inmobilaria Petrocel, Intermarine USA, Mathersa Industries Quimicas, S.A., MICA Corporation, MICA TEK Sales, Inc., MICRON Sales, Inc., Moplefan N.V., Moplefan S.p.A., Moplefan (U.K.), Oy Hercofin Ab, NFW (Australia) Pty. Ltd., PFW (Deutschland) B.V. & Co. Aromen, PFW (Leasing) B.V., PFW Ltd., PFW (Nederland) B.V., PPD Hercules Inc., P.T. Hercules Mas Indonesia, Patex Chemie GmbH, Etichem S.A., Petrocel S.A., Petroleum Fluids, Inc., Polo Industria E. Commercia Ltda., Pomosin AG, Quimica Hercules De Columbia Limited, Quimica Hercules S.A. de C.V., Quimproc, S.A., Rika Hercules Inc., Rohe, S.A. Ross Pulp & Paper, Inc., Semi-Gas Systems, Inc., Simmonds Industries, Inc., d/b/a Cooperative Industries, Inc. Simmonds Precision AG, Simmonds Precision Engine Systems, Simmonds Precision Ltd., Simmonds Precision Motion Controls, Inc., Simmonds Precision NV, Simmonds Precision Products, Inc., St. Croix Petrochemical Corp., Sumika-Hercules Co. Ltd., Taiwan Hercules Chemicals, Inc., Taloquima, S.A., Teratec Systems, Inc., Texas Alkyls Belgium, S.A., Texas Alkyls, Inc.

T H Agriculture & Nutrition Company, Inc., Respondent.

North American Philips Corporation.

Thompson Chemicals Corporation, Respondent.

Wm. Thompson Co.

Uniroyal Inc., Respondent, a corporation was dissolved pursuant to the laws of the State of New Jersey.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Hercules Incorporated, The Dow Chemical Company, Diamond Shamrock Chemicals Company, Monsanto Company, T H Agriculture and Nutrition Company, Inc., Thompson Chemicals Corporation, and Uniroyal, Inc.* respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit Court of Appeals'

* Each respondent joins in this brief only as to those cases in which it has been properly served.

decision affirming summary judgment against the opt-out plaintiffs in *In re "Agent Orange" Product Liability Litigation*, MDL 381.

OPINIONS BELOW

The opinion of the court of appeals is reported at 818 F.2d 187 (2d Cir. 1987) (Pet. App. 752a). The opinions of the district court are reported at 611 F.Supp. 1223 (E.D.N.Y. 1985) (Pet. App. 492a,) and at 611 F.Supp. 1267 (E.D.N.Y. 1985) (Pet. App. 580a).

JURISDICTION

A judgment of the court of appeals was entered April 21, 1987. A petition for rehearing was denied on June 3, 1987. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition arises out of the decision of the United States military to deploy the defoliant "Agent Orange" in Vietnam to deny the enemy cover. It concerns the alleged liability of the defendant chemical companies who manufactured Agent Orange pursuant to the military's specifications for injuries allegedly suffered by servicemen and their families who have opted-out of the Agent Orange class action.

On May 7, 1984, the day jury selection was to begin in the class action, the seven defendants settled the Agent Orange class action for the sum of $180 million. In the words of the court of appeals in approving the fairness of the settlement "it was essentially a settlement at nuisance value." *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 171 (2d Cir. 1987) (Pet. App. 733a).

On July 24, 1984, defendants moved for summary judgment against the plaintiffs who elected to opt out of the settlement. On May 8, 1985, the district court granted summary judgment against the opt-out plaintiffs, stating "there is no possible theory of law on which these individual opt-out plaintiffs can recover",

finding that (1) the opt-out plaintiffs had not presented evidence of a causal link between exposure to Agent Orange and their various claimed injuries sufficient to raise a triable issue of fact; (2) the opt-out plaintiffs were unable to prove that any particular defendant produced the Agent Orange to which they may have been exposed; and (3) the opt-out plaintiffs' claims were barred by the military contractor defense. *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1229, 1262-64 (E.D.N.Y. 1985) (Pet. App. 492a, 494a, 572a-574a).*

In granting summary judgment against the opt-out plaintiffs, the district court relied upon "the more than 6,000 docket entries" which included "all of the voluminous papers filed up to April 30, 1985 by both sides, as well as the documents in all related cases, including those studies and reports filed on the court's own motion as it announced from time to time that it was taking judicial notice." *Id.* at 1230 (Pet. App. 498a).

After "careful scrutiny of all the available evidence" *id.* at 1260 (Pet. App. 565a), the district court granted summary judgment against the opt-outs on the grounds that they could not prove that their alleged injuries were caused by exposure to Agent Orange, finding:

> — No acceptable study to date of Vietnam veterans and their families concludes that there is a causal connection between exposure to Agent Orange and the serious adverse health effects claimed by plaintiffs. Chloracne and porphryia cutanea tarda are the only two diseases that have been recognized by

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* The district court also granted summary judgment against a single opt-out in a separate opinion, *In re "Agent Orange' Product Liability Litigation*, 611 F. Supp. 1267 (E.D.N.Y. 1985) (Pet. App. 580a) (*Lilley v. Dow Chemical Co.*). In *Lilley*, the district court held that the plaintiff could not prove that the injuries claimed were caused by exposure to Agent Orange. The district court also held that "even if plaintiff could show a causal link between Agent Orange and John Lilley's illness, several other legal theories preclude recovery" including "the inability to demonstrate which defendant caused harm" and the "government contract defense." *Id.* at 1285 (Pet. App. 620a).

> Congress as having some possible connection to Agent Orange exposure, but no proof has been shown of any relationship of these diseases to these plaintiffs. *Id.* at 1231 (Pet. App. 499a-500a).
>
> – The studies to date conclude that there is as yet no epidemiological evidence that paternal exposure to Agent Orange causes birth defects and miscarriages. *Id.*
>
> – Epidemiological studies addressing the effect of Agent Orange exposure on veterans' health have not furnished support for plaintiffs' claims. They have been negative or inconclusive. *Id.* at 1232 (Pet. App. 502a).
>
> – No valid study supports plaintiffs' causality claims. *Id.* at 1233 (Pet. App. 503a).
>
> – The [Ranch Hand, Australian and other studies] alone demonstrate that on the basis of present knowledge, there is no question of fact: Agent Orange cannot now be shown to have caused plaintiffs' numerous illnesses. *Id.* at 1241 (Pet. App. 522a).
>
> – In the instant case, years of discovery and tens of millions of dollars by the government and others on research has not yielded any competent evidence indicating a genuine issue of fact about causation. Plaintiffs have had more than enough time to develop their cases. *Id.* at 1260 (Pet. App. 565a).
>
> – Plaintiffs are unable to establish that a material fact exists about causation. *Id.* at 1260 (Pet. App. 567a).

The district court also granted summary judgment against the opt-out plaintiffs on the ground that no opt-out plaintiff could prove "that any particular defendant produced the Agent Orange

to which he may have been exposed," rejecting in the cases of individual opt-outs theories of enterprise and alternative liability. *Id.* at 1262-63 (Pet. App. 572a).

Finally, the district court granted summary judgment against the opt-out plaintiffs on the ground of the military contractor defense, finding:

> It is clear from the records, in light of all the information received to date that the government knew as much or more than the defendant chemical companies about the possible adverse health effects of Agent Orange as it was used in Vietnam. There is no substantial basis for believing that further discovery will reveal any persuasive information on this subject.
>
> The information available makes it clear that the government would have concluded that the beneficial saving of American soldiers' lives by defoliating Vietnamese jungles far outweighed any minimal risks to our own or allied troops posed by exposure to Agent Orange. Such a government decision falls within the discretionary function exception to liability under the Federal Tort Claims Act.

Id. at 1264 (Pet. App. 573a-574a).

On April 21, 1987, the court of appeals affirmed the decision of the district court on the ground that the opt-out plaintiffs' claims were barred by the military contractor defense. *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 187 (2d Cir. 1987) (Pet. App. 752a). The court of appeals stated that it was not necessary to define the precise contours of the defense because "under any formulation, and regardless of the burden of proof, the defendants here were entitled to summary judgment." *Id.* at 192 (Pet. App. 761a).

In affirming on the basis of the military contractor defense, the court of appeals stated:

> We agree with the district court that the information possessed by the government at pertinent times was as great as, or greater than, that possessed by the chemical companies. We add a further reason for affirming the grant of summary judgment based on the military contractor defense. Even today, the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam, even with regard to chloracne and liver damage. The chemical companies therefore could not have breached a duty to inform the government of hazards years earlier.

Id. at 190 (Pet. App. 754a-755a).

The court of appeals stated that a two prong test must be satisfied in order to trigger a duty to inform the government of "a hazard": "first, the existence of the hazard must be based on a substantial body of scientific evidence," and "second, the nature of the danger to friendly personnel created by the hazard must be serious enough to call for the weighing of the risk against the expected military benefits." *Id.* at 192-93 (Pet. App. 761a-762a).

The court of appeals found that neither prong was satisfied. *Id.* The first prong was not met "because of the paucity of scientific evidence that Agent Orange was in fact hazardous there never was information about material hazards that should have been imparted by the chemical companies to the government." The court of appeals explained:

> This is not a case in which a hazard is known to have existed in hindsight and the issue is whether the defendant had sufficient knowledge at an earlier time to trigger an obligation to inform. Rather, this is a case in which subsequent study indicates the absence of any substantial hazard and therefore negates any claim that the chemical companies breached a prior duty to inform.
>
> When Agent Orange was being used in Vietnam, there was some evidence, possessed as we have said by both

the government and the chemical companies, relating chloracne and liver damage exposure to dioxin. Of course the fact that dioxin may injure does not prove the same of Agent Orange, which contained only trace elements of dioxin. The precise hazard of the herbicide, if any, was thus a matter of speculation at the time of its use. Now, some 15 to 20 years after military personnel were exposed to Agent Orange, we have considerably more information of the effects of Agent Orange. As noted in our opinion upholding the settlement, 818 F.2d 145, and explained in greater detail in the district court's opinion approving the settlement, 597 F.Supp. at 787-95, and granting summary judgment against the opt-outs, 611 F.Supp at 1231-34, epidemiological studies of those very personnel and their families fail to show that Agent Orange was hazardous, even with regard to chloracne and liver damage. While the decisions to use Agent Orange were being made, the most relevant question was not, 'What will dioxin do to animals?' or even, 'What will dioxin do to humans exposed to it in industrial accidents?' The most relevant question was, 'What will Agent Orange do to friendly personnel exposed to it?' The epidemiological studies ask the latter question in hindsight and answer, 'Nothing harmful so far as can be told'. The fact that epidemiological studies do not exclude the possibility of harm in isolated or unusual cases or in future cases is of no moment because it does not constitute evidence material to the military decisions in question. Hardly any product of military usefulness is known to be absolutely risk free. Consequently, the existence of a hazard of which the government should have been informed remains unproven to this date, long after the relevant events. Indeed, although chloracne is a leading indicator of exposure to dioxin, it is very rare among Vietnam veterans. Accordingly, there never was information about material hazards that should have been imparted by the chemical companies to the government.

> The military decision to use Agent Orange was, therefore, not ill-informed, much less ill-informed as a result of any action by the chemical companies.

Id. at 194 (Pet. App. 763a-764a).

The court of appeals also found that the second prong was not met:

> The use of Agent Orange in Vietnam was believed necessary to deny enemy forces the benefits of jungle concealment along transportation and power lines and near friendly base areas. Its success as a herbicide saved many, perhaps thousands of, lives. At the time of its use, both the government and the chemical companies possessed information indicating that dioxin posed some dangers to humans. Indeed there is evidence that the chemical companies feared that the presence of dioxin in Agent Orange might lead the government to restrict the sale of pesticides and herbicides in the civilian market. *See* P. Schuck, *Agent Orange on Trial* 85-86 (1986). However, the knowledge of the government and the chemical companies related to chloracne and certain forms of liver damage, ailments now known to be very rare among Vietnam veterans, and not to numerous other ailments alleged in the instant litigation. Moreover, for the reasons stated in Chief Judge Weinstein's opinions, *see Opt-Out Opinion*, 611 F.Supp. at 1263; *Settlement Opinion*, 597 F.Supp. at 795-99, we agree that the critical mass of information about dioxin possessed by the government during the period of Agent Orange's use in Vietnam was as great as or greater than that possessed by the chemical companies. Nevertheless, the government continued to order and use Agent Orange.

Id. at 193 (Pet. App. 762a).

In short, the courts below found that defendants could not have breached any duty to inform the government of hazards

accompanying the use of Agent Orange during the Vietnam War because there were no known hazards then and there are no known hazards today.

REASONS FOR DENYING CERTIORARI

I

Petitioners argue that certiorari should be granted to resolve the conflict in the circuit courts regarding the correct formulation of the military contractor defense. (Pet. Brief at 10-17.) However, that issue need not be addressed here because, as found below, the opt-out plaintiffs' claims are barred under any formulation of the defense. In dismissing a petition as improvidently granted, despite a conflict in the circuits, this Court stated in *Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959):

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the court of appeals is judicial, not simply administrative or managerial. Resolution here of [the issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

Since the courts below found that the opt-out plaintiffs' claims were barred under any formulation of the military contractor defense, a resolution of the conflict among the circuits with regard to the precise formulation of that defense would not change the result below and would, therefore, be meaningless in the context of this litigation.*

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* The issue of the military contractor defense is already before this Court in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, ___ U.S. ___, 107 S.Ct. 872, 93 L.Ed. 2d 827 (1987). Regardless of how this Court may define the contours of the defense, the opt-out plaintiffs' claims would still be barred. Thus, there is no reason to await resolution of *Boyle* before denying the present petition.

Under the definition of the military contractor defense applied by the district court below, a defendant was entitled to judgment dismissing claims against it only if it proved that:

> (1) The government established the specifications for Agent Orange;
>
> (2) That the Agent Orange manufactured by that defendant met the government specifications in all material respects; and
>
> (3) That the government knew as much as or more than that defendant knew or reasonably should have known, about the dangers of Agent Orange, or even if the government had as much knowledge as that defendant should have had, it would have taken steps to eliminate or reduce the hazard.

In re "Agent Orange" Product Liability, 597 F.Supp. 740, 847-50 (E.D.N.Y. 1984) (Pet. App. 365a-370a); 534 F.Supp. 1046, 1055-58 (E.D.N.Y. 1982) (Pet. App. 92a-93a).

The district court found that defendants proved all of the above elements. *See In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223, 1263-64 (E.D.N.Y.) (Pet. App. 573a-574a); 565 F.Supp. 1263, 1274 (E.D.N.Y. 1983) (Pet. App. 125a). The court of appeals affirmed the district court findings and added, as a further reason for affirming the grant of summary judgment, that even today the weight of scientific evidence does not establish that Agent Orange injured personnel in Vietnam. 818 F.2d at 190 (Pet. App. 754a-755a) The court of appeals also stated that it was not necessary under the facts here to define the precise contours of the military contractor defense: "under any formulation, and regardless of the burden of proof, the defendants were entitled to summary judgment," because "the existence of a hazard of which the government should have been informed remains unproven to this date, long after the relevant events." 818 F.2d at 194 (Pet. App. 761a, 764a).

Petitioners refer to three other formulations of the military contractor defense. However, petitioners do not argue, nor could they, that defendants would not be entitled to summary judgment even if this Court were to adopt one of these different formulations of the military contractor defense. Indeed, based on the findings of the courts below, defendants would be entitled to summary judgment under each of the formulations of the military contractor defense petitioners discuss.

Petitioners first refer to the test set forth in *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), which has been adopted by the Fourth, Fifth and Seventh Circuits. *See Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S.Ct. 872, 93 L.Ed. 2d 827 (1987); *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. Oct. 23, 1986) (No. 86-674); *Byrum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985); *Tillett v. JI Case Co.*, 756 F.2d 291 (7th Cir. 1985). In *McKay*, the Ninth Circuit stated that the military contractor defense shields a supplier of military equipment from liability where:

> (1) the United States is immune from liability under *Feres* and *Stencel*,
>
> (2) the supplier proves that the United States established or approved, reasonably precise specifications for the allegedly defective military equipment;
>
> (3) the equipment conformed to those specifications; and
>
> (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

704 F.2d at 451.

All the *McKay* elements have been proven by the defendants. The courts below found that the government was immune from liability under *Feres/Stencel* and the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §§1346 (b) *et seq.*, that the government established the specifications for Agent Orange, that the defendants met the specifications in all material respects and that the government knew as much as or more than the defendants knew or should have known about the hazards accompanying the use of Agent Orange. 818 F.2d at 190 (Pet. App. 754a); 611 F.Supp. at 1263-64 (Pet. App. 573a-574a); 565 F.Supp. at 1274 (Pet. App. 125a).

Petitioners criticize *McKay* as requiring a supplier to inform only about defects of which it has actual knowledge, rather than about defects of which it reasonably should have known and that mere government approval of a supplier's design shields it from liability. (Pet. Brief at 12). However, the district court's formulation in this case required the defendants to prove that the government knew as much as or more than the defendants knew or reasonably should have known about the dangers of Agent Orange and to have, in fact, established the specifications. Thus, not only did the defendants meet the *McKay* test, they met the harder test applied by the district court below.

Petitioners also refer to what they term "a hybrid form of the *McKay* and *Agent Orange* standards" adopted by the Third Circuit in *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3rd Cir.), *cert. denied*, 474 U.S. 821 (1985). (Pet. Brief at 12). In *Koutsoubos*, the court broadened the second prong of the *Agent Orange* test to allow a supplier the benefit of the military contract or defense where there were "back and forth" negotiations between the government and supplier leading to approval of the specification. As petitioners point out, under the district court's formulation defendants were required to prove that the government affirmatively established the specifications for Agent Orange (Pet. Brief at 12). Thus, defendants proved more than would be required under *Koutsoubos*.

Petitioners urge that if this Court chooses to recognize the military contractor defense it should adopt the test announced

by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529) (Pet. Brief at 23-25). However, *Shaw* is unavailing.

In *Shaw* the Eleventh Circuit stated that to prevail on the military contractor defense, a contractor must prove:

> (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or
>
> (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

778 F.2d 746.

The *Shaw* court noted that in making an assessment of the sufficiency of the warning, the court may take into account evidence that goes to the military's own level of knowledge and expertise. *Id.*

The courts below found that the government established the specifications for Agent Orange, that the Agent Orange manufactured by the defendants met the government's specifications in all material respects and that the government knew as much as or more than the defendants knew or should have known about the dangers posed by Agent Orange and that the government continued to order and use Agent Orange not withstanding its knowledge. 818 F.2d at 193 (Pet. App. 762a). Thus, defendants satisfied all the elements under the *Shaw* test as well.

Moreover, all of the formulations discussed by petitioners assume the existence of a dangerous defect of which the contractor has a duty to warn. Here, however, the courts below found that no such defect could be proven and no warning was required. *See e.g.* 818 F.2d at 190 (Pet. App. 754a-755a).

Petitioners further argue that the formulation of the military contractor defense applied by the district court should be rejected because it "improperly places the initial burden on the plaintiff to prove that a product's hazards were known, or reasonably should have been known, to the defendants." (Pet. Brief at 24). However, petitioners ignore the fact that the court of appeals determined on the basis of the record before it that defendants were entitled to summary judgment "under any formulation, and regardless of which party bears the burden of proof." 818 F.2d 192 (Pet. App. 76la).

II.

Petitioners' argument that the military contractor defense has no rational basis in public policy or law (Pet. Brief. at 18) is both without merit and an insufficient basis for granting their petition. Every court of appeals which has addressed the military contractor defense has approved the defense based on sound policy reasons which need not be reiterated here. *See Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S. Ct. 872, 93 L. Ed. 2d 827 (1987); *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. Oct. 23, 1986) (No. 86-674); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529); *Byrum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3rd Cir.), *cert. denied*, 474 U.S. 832 (1985); *McKay v. Rockwell Int'l. Corp.*, 705 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

Moreover, this issue is already before the Court in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, ____ U.S. ____, 107 S.Ct. 872, 93 L.Ed. 2d 827 (1987), and it is unnecessary to grant certiorari in this case to consider it.

III.

Petitioners' argument that the court of appeals departed from this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986) (Pet. Brief at 25-29), is similarly without merit.

In *Celotex*, this Court stated that the

> [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are 'designed to secure the just, speedy and inexpensive determination of every action'.... Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

106 S.Ct. at 2555.

The district court below granted summary judgment on the military contractor defense because it found no genuine factual dispute as to whether the government knew as much as, or more than, the defendant chemical companies about the possible adverse health effects of Agent Orange. 611 F.Supp. 1263 (Pet. App. 573a-574a).

The court of appeals affirmed the district court's findings that the information possessed by the government was at all relevant times as great as, or greater than, that possessed by the defendants. The court of appeals also affirmed on the further ground that defendants could not have breached a duty to warn in circumstances where there was nothing known then nor is there anything known now to warn against. 818 F.2d 189-190 (Pet. App. 754a-761a).

Petitioners' contention that the court of appeals failed to examine critically whether the evidence supported its findings (Pet. Brief at 26) is without support. The courts below examined all the evidence in the record. Moreover, the court of appeals specifically cited to (1) the district court's discussion on "Scientific Studies on Causality" and the "Knowledge of the Government and Defendants" contained in the district court's opinion on the fairness of the settlement; and (2) the epidemiological studies relied upon by the district court in granting summary judgment against the opt-outs. 818 F.2d at 193 (Pet. App. 762a). Furthermore, in its opinion upholding the class action settlement, the court of appeals specifically referred to its examination of the scientific evidence offered by the opt-outs in response to the defendants' motion for summary judgment. 818 F.2d at 172-173 (Pet. App. 735a).

Petitioners' argument that *Celotex* required the court of appeals to cite to all the evidence submitted by plaintiffs and defendants in its opinion affirming summary judgment is without support. In *Celotex*, this Court held that a party moving for summary judgment need not support its motion with affidavits or other similar materials negating an opponent's claim and that "the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for summary judgment, as set forth in Rule 56(c), is satisfied." 106 S.Ct. at 2553.

Here, the standard for summary judgment was satisfied, and the courts below properly found, on the basis of the entire record before them, that defendants were entitled to summary judgment on the military contractor defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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